(37)

UNITED
NATIONS

A

General Assembly

Distr.
LIMITED

A/CN.4/L.491/Rev.2/Add.2
18 July 1994

ENGLISH
Original: ENGLISH

INTERNATIONAL LAW COMMISSION
Forty-sixth session
2 May-22 July 1994

# WORKING GROUP ON A DRAFT STATUTE FOR AN INTERNATIONAL CRIMINAL COURT

## Report of the Working Group

CONTENTS

Draft commentary to Parts 4 and 5 of the Draft Statute (arts. 25 to 47)

## PART 4: INVESTIGATION AND PROSECUTION

### Article 25: Complaint

Commentary

(1) The Court is envisaged as a facility available to States Parties to its Statute, and in certain cases to the Security Council. The complaint is the mechanism that invokes this facility and initiates the preliminary phase of the criminal procedure. Such a complaint may be filed by any State party which has accepted the jurisdiction of the Court with respect to the crime complained of. In the case of genocide, where the Court has jurisdiction without any additional requirement of acceptance, the complainant must be a Contracting Party to the Genocide Convention and thus entitled to rely on Article VI of the Convention: see paragraph 1. In this context it may be recalled that any Member of the United Nations, and any other State invited to do so by the General Assembly, may become a Contracting Party to the Genocide Convention: see Article XI.

(2) On balance the Working Group believes that resort to the Court by way of complaint should be limited to States parties. This may encourage States to accept the rights and obligations provided for in the Statute and to share in the financial burden relating to the operating costs of the Court. Moreover in practice the Court could only satisfactorily deal with a prosecution initiated by complaint if the complainant is cooperating with the Court under Part 7 of the Statute in relation to such matters as the provision of evidence, witnesses, etc.

(3) As noted above in relation to article 23, in cases where the Court has jurisdiction by virtue of a decision of the Security Council under Chapter VII of the Charter, the actual prosecution will be a matter for the Procuracy and there will be no requirement of a complaint: see article 25 (4). The Procuracy should have equal independence in relation to cases initiated under article 23 (1) as to those initiated by a complaint.

(4) One member suggested that the Prosecutor should be authorized to initiate an investigation in the absence of a complaint if it appears that a crime apparently within the jurisdiction of the Court would otherwise not be duly investigated. However, other members felt that the investigation and prosecution of the crimes covered by the Statute should not be undertaken in the absence of the support of a State or the Security Council, at least not at the present stage of development of the international legal system.

(5) The complaint is intended to bring to the attention of the Court the apparent commission of a crime. The complaint must as far as possible be accompanied by supporting documentation: see paragraph 3. The Court is envisaged as a mechanism that should be available whenever necessary, but which

should not be activated unless there is reason to do so. Given the personnel required for and the costs involved in a criminal prosecution, the jurisdiction should not be invoked on the basis of frivolous, groundless or politically motivated complaints. Moreover, the Prosecutor must have the necessary information to begin an investigation. This is not to suggest that the complaint must itself establish a prima facie case, but rather that it should include sufficient information and supporting documentation to demonstrate that a crime within the jurisdiction of the Court has apparently been committed, and to provide a starting point for the investigation.

Article 26: Investigation of alleged crimes

Commentary

(1) The Prosecutor, upon receipt of a complaint, is responsible for the investigation and the prosecution of the alleged crime. The Procuracy will investigate a complaint unless the Prosecutor on an initial review of the complaint and supporting documentation concludes that there is no possible basis for such an investigation. In the latter case, the Presidency is to be informed: see also paragraph 5.

(2) In conducting the investigation, the Procuracy should have the power to question suspects, victims and witnesses, to collect evidence, to conduct on-site investigations, etc. The Prosecutor may seek the cooperation of any State and request the Court to issue orders to facilitate the investigation. During the investigation, the Prosecutor may request the Presidency to issue subpoenas and warrants, since a Chamber will not be convened until a later stage, when the investigation has produced sufficient information for an indictment and a decision has been made to proceed.

(3) Under some penal systems, a distinction is made between the phase of investigation of a complaint by the police ("poursuite") and the subsequent more formal phase of preparation of the prosecution under the control of an examining magistrate ("instruction"). Although this system offers a number of guarantees of the integrity of the prosecution process, it has not been adopted in the draft Statute, for a number of reasons. First, the Statute offers its own guarantees of the independence of the prosecution process and of the rights of the suspect. Secondly, it is envisaged that complaints will not be brought before the Court without preliminary investigation on the part of the complainant State, which may

substitute for the process of initial inquiry an investigation to some degree. Thirdly, the intention of the Statute is to create a flexible structure which does not involve undue expense or the proliferation of offices.

(4) Questions of cooperation on the part of States with the execution of subpoenas and warrants are dealt with in Part 7 of the Statute. See especially articles 51, 52 and 53.

(5) At the investigation phase, a person who is suspected of having committed a crime may be questioned, but only after being informed of the following rights: the right not to be compelled to testify or to confess guilt; the right to remain silent without reflecting guilt or innocence; the right to have the assistance of counsel of the suspect's choice; the right to free legal assistance if the suspect cannot afford a lawyer, and the right to interpretation during questioning, if necessary. Cf. ICCPR, article 14.

(6) There is some overlap between the provisions concerning the rights of a suspect, a person believed to have committed a crime but not yet charged, and the rights of the accused, a person formally charged with the crime in the form of an indictment confirmed under article 27. However, the rights of the accused during the trial would have little meaning in the absence of respect for the rights of the suspect during the investigation, for example the right not to be compelled to confess to a crime. Thus, the Working Group felt that it was important to include a separate provision to guarantee the rights of a person during the investigation phase, before the person has actually been charged with a crime. It is also necessary to distinguish between the rights of the suspect and the rights of the accused since the former are not as extensive as the latter. For example, the suspect does not have the right at this stage to examine witnesses or to be provided with the prosecution evidence. The rights which are guaranteed to the accused in these respects are contained in article 41 (1) (e) and (2).

(7) Following the investigation, the Prosecutor must assess the information obtained and decide whether or not there is a sufficient basis to proceed with a prosecution. If not, the Prosecutor must so inform the Presidency which may at the request of the complainant State or (in a case initiated by it) the Security Council, review a decision of the Prosecutor not to proceed with a prosecution. This reflects the view that there should be some possibility of judicial review of the Prosecutor's decision not to proceed with a case. On the other hand, for

the Presidency to direct a prosecution would be inconsistent with the independence of the Prosecutor, and would raise practical difficulties given that responsibility for the conduct of the prosecution is a matter for the Prosecutor. Hence paragraph 5 provides that the Presidency may request the Prosecutor to reconsider the matter, but leaves the ultimate decision to the Prosecutor. This procedure applies equally in the case of a decision of the Prosecutor under paragraph 1 not to proceed with a prosecution.

(8) Some members of the Working Group would prefer that the Presidency also have the power to annul a decision of the Prosecutor not to proceed to an investigation or not to file an indictment in cases where it is clear that the Prosecutor has made an error of law in making that decision. Respect is due to decisions of the Prosecutor on issues of fact and evidence but like all other organs of the court the Prosecutor is bound by the Statute and the Presidency should, in this view, have the power to annul decisions shown to be contrary to law.

(9) The phrase "sufficient basis" in paragraph 4 is intended to cover a number of different situations where further action under the Statute would not be warranted: first, where there is no indication of a crime within the jurisdiction of the Court; second, where there is some indication of such a crime but the Prosecutor concludes that the evidence available is not strong enough to make a conviction likely; third, where there is prima facie evidence of a crime within the jurisdiction of the Court, but the Prosecutor is satisfied that the case would probably be inadmissible under article 35.

Article 27: Commencement of prosecution

Commentary

(1) While the complaint is the document that initiates the investigation of an alleged crime, the indictment is the document on the basis of which a prosecution is commenced. If after investigation the Prosecutor concludes that there is a prima facie case against the suspect in respect of a crime within the Court's jurisdiction, and that it is desirable having regard to article 35 for the prosecution to be commenced, the Prosecutor is to prepare an indictment including a concise statement of the facts alleged and of the crime or crimes alleged to have been committed. A prima facie case for this purpose is understood to be a

credible case which would (if not contradicted by the defence) be a sufficient basis to convict the accused on the charge.

(2) The Prosecutor then submits the indictment and any necessary supporting documentation to the Presidency, which reviews the indictment and decides whether there is indeed a prima facie case of crime alleged to have been committed by the person named, and whether, having regard to the matters referred to in article 35, the case is apparently one over which the Court should exercise jurisdiction. If the answer to both questions is in the affirmative, it should confirm the indictment and convene a Chamber, in accordance with article 9, to conduct the trial. It is at this point in time, when the indictment is affirmed by the Court, that the person is formally charged with the crime and a "suspect" becomes an "accused".

(3) Before deciding whether to confirm an indictment, the Presidency may wish to ask the Prosecutor to provide further information, and may suspend consideration of whether to confirm an indictment while it is being sought, provided that, having regard to article 9 (3) of the ICCPR, the procedure is not unnecessarily delayed. Delay may be a consideration especially where the accused is in custody: see articles 28 (2), 41 (1) (c). The procedure will take place in private, and without notification to the suspect. It will not require examination of witnesses as distinct from examination of the case file presented by the Prosecutor, which should fully reflect the case as prepared at this stage of the proceedings. Cf. the special procedure of an Indictment Chamber under article 37 (4).

(4) Although this form of review of the indictment is necessary in the interests of accountability and in order to ensure that the Court only exercises jurisdiction in circumstances provided for by the Statute, it must be emphasized that confirmation of the indictment is in no way to be seen as a pre-judgement by the Court as to the actual guilt or innocence of the accused. The confirmation occurs in the absence of and without notice to the accused, and without any assessment of the defence as it will be presented at the trial.

(5) In some legal systems, an indictment is a public document, unless for some special reason it is ordered to be "sealed". By contrast, under the Statute the Court will only publish an indictment at the beginning of the trial (see art. 38

(1) (a)), or as a result of a decision of an Indictment Chamber in the special circumstances envisaged by article 37 (4).

(6) At a later stage it may be necessary to amend an indictment, and the Court has power to do so on the recommendation of the Prosecutor under paragraph 4, ensuring at the same time that the accused is notified of the amendment and has any necessary additional time to prepare a defence. Such an amendment may involve changes in the particular allegations made, provided that they fall within the scope of the original complaint and of the jurisdiction of the Court. If the changes amount to a substantially different offence, a new indictment should be filed, and if the conditions laid down in the Statute for the Court's jurisdiction have materially altered, a new complaint may have to be lodged.

(7) Once the indictment has been affirmed, the Presidency may issue an arrest warrant (as to which see art. 28) and other orders required for the prosecution and conduct of the trial, including the particular orders referred to in paragraph 5. It is intended, however, that the Chamber should assume responsibility for subsequent pre-trial procedures once it is convened.

(8) If, after any necessary adjournment, the indictment is not confirmed, the procedure is at an end and the suspect, if in custody in relation to the complaint, would normally be entitled to be released. This is of course without prejudice to any other lawful basis for the detention of the suspect, e.g. under national law. The complainant State and, in a case initiated by the Security Council under article 23 (1), the Council, should be informed of any decision not to confirm the indictment.

Article 28: Arrest

Commentary

(1) Provisions dealing with the arrest and detention of an accused person are drafted so as to ensure compliance with relevant provisions of the ICCPR, especially article 9: see paragraphs 2 and 4, and articles 29 and 30.

(2) Prior to the confirmation of the indictment, the Presidency may order the arrest or detention of a suspect on the basis of a preliminary determination that there are sufficient grounds for doing so and a real risk that the suspect's presence at trial cannot otherwise be assured: see paragraph 1. This is referred to here as provisional arrest, following the language commonly used in extradition agreements and contained in General Assembly resolution 45/116 of 14

December 1990, Annex, Model Treaty on Extradition, article 9. In some legal systems it is referred to as provisional detention, but for the purposes of the present Statute it is desirable to distinguish between the arrest of a person and that person's subsequent detention.

(3) Provisional arrest is intended as a rather exceptional remedy, since it would occur prior to any determination by the Court that the necessary conditions for the exercise of its jurisdiction appear to exist. By contrast, once the indictment has been confirmed, every effort should be taken to ensure that the accused is taken into custody so as to be available for trial. Normally the Presidency will grant a warrant for arrest of an accused unless it is clear that the accused will appear, or there are special circumstances (e.g. the fact that the accused is detained by a State party, or is serving a sentence for some other crime) making it unnecessary for the time being to issue the warrant.

(4) Article 28 deals only with the issue of a warrant of arrest. Judicial assistance on the part of States with respect to execution of warrants is dealt with in articles 52 and 53.

Article 29: Pre-trial detention or release

Commentary

(1) Article 29 deals with the issue of pre-trial detention or release on bail. It is drafted so as to ensure conformity with article 9 of the ICCPR. It requires that any person arrested pursuant to a warrant issued under article 28 should be brought promptly before a judicial officer of the State in which the arrest occurred, who should determine, in accordance with the procedures applicable in that State, whether the warrant has been duly served and that the rights of the accused have been respected. The Working Group acknowledges that there is some risk in entrusting these powers to a State official (usually a magistrate or some similar person exercising similar functions under national law) rather than before an organ of the Court. However, it is essential under article 9 (3) of the ICCPR that this preliminary opportunity for review of the arrest be provided promptly, and in practice this can only be done in this way. Since ex hypothesi the arresting State will be cooperating with the Court, there is no reason to expect that this preliminary procedure will cause difficulties.

(2) On the other hand, release whether unconditionally or on bail pending trial is a matter for the Presidency. In conformity with article 9 (4) of the ICCPR,

it is provided that a person arrested pursuant to a warrant issued under article 28 may apply to the Court for a determination of the lawfulness under this Statute of the arrest or detention: see paragraph 3. The Court must decide whether the arrest and detention were lawful, and if not it shall order the release of the accused. In the case of wrongful arrest it may award compensation accordingly, as required by article 9 (5) of the ICCPR, which provides that "Anyone who has been victim of unlawful arrest or detention shall have an enforceable right to compensation". The Working Group believes that the full range of guarantees to suspects and accused persons should be provided in the draft Statute. Issues of compensation to an accused unlawfully detained are of such a character, as compared with the different problem of the restitution of property rights of victims, as to which see the commentary to article 47.

(3) Article 9 (3) of the ICCPR provides that "it shall not be the general rule that persons awaiting trial shall be detained in custody", and this is the position under the Statute. On the other hand charges under the Statute are by definition brought only in the most serious cases, and it will usually be necessary to detain an accused who is not already in secure custody in a State. Article 9 (3) also provides that an accused "shall be entitled to trial within a reasonable time or to release". The right of an accused under the Statute to a prompt trial is contained in article 41 (1) (c). The Court should take this into account in exercising its powers under article 29. But having regard to the gravity of the offences concerned, the Working Group decided against including specific time-limits within which a prosecution should be brought or the accused released.

(4) Unless released under article 29, a person arrested is to be held pending trial, either in an appropriate place of detention in the arresting State, in the State in which the trial is to be held, or, if necessary and as a last resort in the host State. Paragraph 4 is based on the assumption that detention will usually occur on the territory of the arresting State, but there may be good reasons (e.g. in terms of the secure detention of the accused, or even, the accused's physical safety) for another location.

Article 30: Notification of the indictment

Commentary

(1) As soon as an accused has been arrested on a warrant, the Prosecutor is required to take all necessary steps to notify the accused of the charge by serving the documents mentioned in paragraph 1. Subject to paragraph 3, discussed below, there is no obligation to inform a person of a charge prior to arrest, for the obvious reason that to do so may prompt the suspect to flee.

(2) The same principle applies to provisional arrest of a suspect, except that in this case a statement of the charges approved by the Presidency should be served, since the indictment may not yet exist and in any event will not have been confirmed. In the event the indictment is not confirmed the suspect is entitled to be released, although again this would be without prejudice to any valid ground for arrest and detention that may otherwise exist.

(3) There is provision for some alternative form of notice if the accused is not under arrest 60 days after the issue of the warrant: see paragraph 3. This is most likely to occur as a precursor to a hearing before a Special Indictment Chamber under article 37 (4). Other forms of notice could make use of various forms of media, or in the case of persons in the control of a government, by communication to that government.

(4) As with article 28, article 30 deals only with the required notification by the Court. Issues of judicial assistance on the part of States are dealt with in Part 7. It is envisaged that the Rules will make provision for the due authentication of documents contained in requests under these articles.

Article 31: Designation of persons to assist in a prosecution

Commentary

(1) This article is intended to facilitate investigations and prosecutions by making qualified and experienced personnel available on request to the Prosecutor. States parties may, at the request of the Prosecutor, designate persons available to assist in the investigation or prosecution of a case, either a particular case or in general. Arrangements for the terms and conditions on which such persons will work should be approved in advance by the Presidency, which will have overall financial responsibility to the States parties for the operation of the Court. They may or may not involve the persons becoming temporary employees of the Procuracy: if they do, the staff Regulations referred to in article 12 (7) will apply.

(2) States should be prepared to make persons available for the duration of the prosecution. Any such persons would serve under the director of the Prosecutor and would be prohibited from seeking or receiving instructions from their Government or any other source. A similar provision concerning the staff of the United Nations is found in Article 100 of the Charter.

(3) At least in the initial stages of the establishment of the Court and subject to the provisions of the relationship agreement foreshadowed in article 2, consideration could be given to seconding personnel from the United Nations Secretariat to serve in the Procuracy.

## PART 5: THE TRIAL

### Article 32: Place of trial

Commentary

(1) Trials will normally take place at the seat of the Court. Alternatively, the Court may decide, in the light of the circumstances of a particular case, that it would be more practical to conduct the trial closer to the scene of the alleged crime, for example, so as to facilitate the attendance of witnesses and the production of evidence.

(2) Proximity of the trial to the place where the crime was allegedly committed may cast a shadow over the proceedings, raising questions concerning respect for the defendant's right to a fair and impartial trial or it may create unacceptable security risks for the defendant, the witnesses, the judges or the staff of the Court. Thus, trials may take place in a State other than the host State only when it is both practicable and consistent with the interests of justice to do so. The Chamber may request the views of the Prosecutor or the defence on this question, without unnecessarily delaying the commencement of the trial.

(3) Trials taking place in States other than the host country would be conducted pursuant to an arrangement with the State concerned which may or may not be a State party to the Statute. This arrangement would need to address matters similar to those to be provided for the agreement with the host State under article 3, and possibly other matters if the trial is to be held in a State which is not a party to the Statute.

### Article 33: Applicable law

Commentary

(1) In the draft Statute adopted in 1993, the Working Group had placed this article in the Part dealing with jurisdiction. However, there is a distinction between jurisdiction and applicable law, and it seems appropriate to place the article in Part 5, dealing with the primary function of the Court, the exercise of jurisdiction through a Trial Chamber. But article 33 applies in relation to all actions taken by the Court at any stage.

(2) The first two sources of applicable law mentioned by the draft article are the Statute itself and applicable treaties. It is understood that, in cases of jurisdiction based on treaties under article 20 (e), the indictment will specify the charges brought against the accused by reference to the particular treaty provisions, which will, subject to the Statute, provide the legal basis for the charge. The principles and rules of general international law will also be applicable. The expression "principles and rules" of general international law includes general principles of law, so that the Court can legitimately have recourse to the whole corpus of criminal law, whether found in national forums or in international practice, whenever it needs guidance on matters not clearly regulated by treaty.

(3) The mention in the draft articles of rules of national law acquires special importance in the light of the inclusion in the Annex of treaties which explicitly envisage that the crimes to which the treaty refers are none the less crimes under national law. The dictates of the nullum crimen principle (as to which see art. 39) require that the Court be able to apply national law to the extent consistent with the Statute, applicable treaties and general international law. This is in any event desirable, as international law does not yet contain a complete statement of substantive criminal law. The Court will need to develop criteria for the application of rules of national criminal law, to the extent to which they are properly applicable to a given situation. In the event of a conflict between national and international law, the latter (including the nullum crimen principle, itself part of international law) will prevail.

Article 34: Challenges as to jurisdiction

Commentary

(1) This is, as explained in the introduction in Part 3 above, an important provision, which is intended to ensure that the Court adheres carefully to the scope of jurisdiction defined by the Statute. The Court can be called on to

exercise its powers under article 34 either by the accused or by any interested State. The term "interested State" is not defined but is intended to be interpreted broadly. For example a State which has lodged an extradition request with respect to an accused would be an "interested State" for this purpose, as also a State whose cooperation had been sought under Part 7 of the Statute.

(2) Challenges under article 34 may be made, in accordance with procedures laid down in the Rules, at any time after confirmation of an indictment up to the commencement of the hearing. In addition the accused may challenge the jurisdiction at any later stage of the trial, in which the Court would have the discretion to deal with the challenge as a separate issue or to reserve it to be decided as part of its judgement at the conclusion of the trial.

### Article 35: Issues of admissibility

#### Commentary

(1) Article 35 allows the Court to decide, having regard to certain specified factors, whether a particular complaint is admissible and in this sense it goes to the exercise, as distinct from the existence, of jurisdiction. This provision responds to suggestions made by a number of States, in order to ensure that the Court only deals with cases in the circumstances outlined in the preamble, i.e. where it is really desirable to do so. Issues arising under article 35 should normally be dealt with as soon as possible after they are made. After the commencement of a trial they can only be dealt with on the Court's own motion, on the basis that there will usually be no point in questioning then the exercise of a jurisdiction that has already begun to be exercised.

(2) The grounds for holding a case to be inadmissible are, in summary, that the crime in question has been or is being duly investigated by any appropriate national authorities or is not of sufficient gravity to justify further action by

the Court. In deciding whether this is the case the Court is directed to have regard to the purposes of the Statute as set out in the preamble. Where more than one State has or may have jurisdiction over the crime in question, the Court may take into account the position of each such State.

(3) Some members of the Working Group believed that it was not necessary to include article 35, as the relevant factors could be taken into account at the level of jurisdiction under articles 20, in particular 20 (e), and 21. Others pointed out that the circumstances of particular cases could vary widely and could anyway be substantially clarified after the Court assumed jurisdiction so that a power such as that contained in article 35 was necessary if the purposes indicated in the preamble were to be fulfilled.

Article 36: Procedure under articles 34 and 35

Commentary

(1) Articles 34 and 35 must be read in conjunction with article 36, which lays down certain aspects of the procedure to be followed in the case of challenges under those provisions. More detailed aspects of the procedure will be laid down in the Rules.

(2) It is envisaged that as far as may be all challenges under articles 34 and 35 should be heard together as soon as possible. The aim should be to resolve the issue one way or the other by the commencement of the trial. Thus, if a State makes a challenge under articles 34 or 35, both the accused and the complainant State have a full right to be heard but should not subsequently be allowed to relitigate the question. These questions are to be dealt with by the Trial Chamber, as provided in paragraph 2, subject to the possibility of referral of any case raising issues of general principle to the Appeals Chamber.

Article 37: Trial in the presence of the accused

Commentary

(1) The question whether trial in absentia should be permissible under the Statute has been extensively discussed in the Commission, in the Sixth Committee and in the written comments of governments. One view, quite widely held, was that trial in absentia should be excluded entirely, on the ground, inter alia, that the Court should only be called into action in circumstances where any judgement and sentence could be enforced, and that the imposition of judgements and sentences in absentia with no prospect of enforcement would bring the Court

into disrepute. Another view would allow such trial only in very limited circumstances. On the other hand some members of the Commission and some governments were strongly supportive of trial in absentia.

(2) The 1993 draft Statute provided only that an accused should have the right "to be present at the trial, unless the Court, having heard such submissions and evidence as it deems necessary, concludes that the absence of the accused is deliberate" (art. 40 (1) (d)). As a reflection of the right to be present at one's trial, which is contained in article 14 (1) (d) of the ICCPR, this was regarded as striking a satisfactory balance by many governments: others were opposed to it.

(3) There was, however, a problem with the 1993 formulation in that it did not regulate the consequences of the absence of the accused. By contrast international human rights bodies dealing with article 14 (1) (d) and its equivalent have held that trial in absentia, to be consistent with human rights standards, must be carefully regulated, with provisions for notification of the accused, for setting aside the judgement and sentence on subsequent appearance, etc. See e.g. Mbenge v. Zaire (Communication No. 16/1977, Views of the Human Rights Committee adopted 25 March 1983), in Selected Decisions of the Human Rights Committee under the Optional Protocol (1990) volume 2, page 76; and the decisions of the European Court of Human Rights in Colozza v. Italy (1985) Ser A No. 89; FCB v. Italy (1991) Ser A No. 208-B; T v. Italy (1992) Ser A No. 245-C; Poitrimol v. France (1993) Ser A No. 277-A. See also the rather elaborate guidelines in Council of Europe Resolution (75) 11 of 21 May 1975 ("On the Criteria Governing Proceedings held in the Absence of the Accused"). The Statute of the International Tribunal for the Former Yugoslavia evidently contemplates that the accused will be present at the trial: see article 20 (2). The Rules of that Tribunal, while not providing for trial in absentia as such, do provide for a form of public confirmation of the indictment in cases where the accused cannot be brought before it, and this procedure would fulfil some of the purposes of a trial in absentia (see Rule 61). For example, the procedure allows for the public issue of "an international arrest warrant" and could make the accused in a certain sense a fugitive from international justice.

(4) The Working Group believes that it is right to begin (as the Council of Europe resolution of 1975 did) with the proposition that the presence of the

accused at the trial is "of vital importance", not only because of article 14 (1) (d) of the ICCPR but in order to establish the facts and, if the accused is convicted, to enable an appropriate and enforceable sentence to be passed. Exemptions to this principle should be allowed "only in exceptional cases".

(5) The principle itself is stated in the form of a "general rule" in paragraph 1. Three exceptions are allowed for in paragraph 2: ill-health or security risks to an accused who is in custody or has been released pending trial; continued disruption to the trial (i.e. after an initial warning has been given to the accused of the consequences of such disruption); and the fact that the accused has escaped from custody under the Statute or has broken bail. It will be a matter for the Chamber to decide whether to proceed to a trial in the absence of the accused in any of these circumstances.

(6) In any case if it does so decide, the Chamber must ensure that the rights of the absent accused under the Statute are respected. Of particular importance is the right to legal representation by a court-appointed lawyer. The minimum steps to be taken are spelt out in paragraph 3.

(7) In addition, the Working Group was attracted to the solution adopted in the Rules of the International Tribunal for the Former Yugoslavia, referred to above. Thus paragraph 4 allows for the Rules of the Court to establish an analogous procedure before an Indictment Chamber, which would hear and record the available evidence, determine publicly whether it amounted to a prima facie case against the accused, and take any available steps to have the accused brought before the Court for trial. Since the members of the Chamber would actually hear the witnesses and would publicly pronounce on their credibility (although to the level of a prima facie case only), it seems desirable, having regard to the considerations discussed in the commentary to article 8 (4) above, to disqualify members of an Indictment Chamber from sitting at a subsequent trial of the accused: see paragraph 5.

Article 38: Functions and Powers of the Trial Chamber

Commentary

(1) Article 38 deals with the general powers of the Trial Chamber with respect to the conduct of the trial. The Trial Chamber has a full range of powers in respect of the proceedings. It is envisaged that once the Trial Chamber is

established it will take over all pre-trial matters in order to establish continuity in the handling of the case: see paragraph 5.

(2) The overriding obligation of the Trial Chamber is to ensure that every trial is fair and expeditious, and is conducted in accordance with the Statute, with full respect for the rights of the accused and due regard for the protection of victims and witnesses. Before proceeding to the trial the Chamber must satisfy itself that the rights of the accused have been respected, and in particular that the provisions relating to pre-trial
disclosure of evidence by the prosecution have been complied with in time to allow a proper preparation of the defence: see paragraph 1 (b) and articles 27 (5) (b) and 30.

(3) Details of the procedure of the Court should be laid down in the Rules, and will no doubt evolve with experience. It is intended that the Court should itself have the right to call witnesses and ask questions, although it may also leave that task to the Prosecutor and defence counsel, and the right of the accused to present a defence must not be impaired.

(4) Paragraph 1 (d) provides that an accused is to be allowed to enter a plea of guilty or not guilty. In some legal systems there is no provision at all for such a plea; in some others, an accused is actually required to plead. In some legal systems a guilty plea substantially shortens the trial, and avoids the need for any evidence to be called on the question of culpability; in others it makes very little difference to the course of the proceedings. In line with the precedent of the Statute of the International Tribunal for the Former Yugoslavia, paragraph 1 (d) allows an accused who wishes to do so to enter a plea of guilty or not guilty, but does not require this. In the absence of a plea the accused will be presumed not guilty, and the trial will simply proceed. The Court should ascertain in advance whether an accused does wish to enter a plea: if not, the matter would simply not be raised at the trial.

(5) But the fact that the accused has decided to plead, and has entered a plea of guilty, will not mean a summary end to the trial or an automatic conviction. It will be a matter for the Chamber, subject to the Rules, to decide how to proceed. It must, at a minimum, hear an account from the Prosecutor of the case against the accused and ensure for itself that the guilty plea was freely entered and is reliable. In many cases it may be prudent to hear the whole of the

prosecution case; in others, only the key witnesses may need to be called to give evidence, or the material before the Court combined with the confession will themselves be certain proof of guilt. If the accused elects not to be legally represented, it will usually be prudent to ignore the plea and to conduct the proceedings as far as possible in the same way as if they were being vigorously defended.

(6) Paragraph 3 makes provision for joinder of charges against more than one accused in a single proceeding, although it should be open to an accused to object to joinder for sufficient reason, under procedures provided by the Rules (cf. International Tribunal for the Former Yugoslavia, rules 48, 73 (A) (IV) and 82).

(7) As a general rule trials should be held in public, but the Trial Chamber may decide to hold all or part of a trial in closed session in order, for example, to protect the accused, victims or witnesses from possible intimidation or for the purpose of protecting confidential or sensitive information which is to be given in evidence. See further article 43.

(8) Paragraph 7 requires a complete record of proceedings to be kept. By this the Working Group understands a full transcript of the trial, which could take the form of a tape or video recording. The record of the trial will be of particular importance in the event of an appeal or revision under articles 48 or 50.

Article 39: Principle of legality (nullum crimen sine lege)

Commentary

(1) The principle nullum crimen sine lege is a fundamental principle of criminal law, recognized in article 15 of ICCPR. Article 39 gives direct effect to this principle in the particular context of the Statute.

(2) The application of the principle varies according to whether the crime in question is a crime under general international law (see art. 20 (a) to (d)) or whether it involves a crime under or in conformity with a treaty provision listed in the Annex (see art. 20 (e)). As to the former, subparagraph (a) merely ensures that the relevant crime will not be applied to conduct which was not a crime under international law at the time it was committed. In this context it constitutes a specific application of the principle prohibiting the retrospective application of the criminal law.

(3) By contrast, in the case of treaty crimes the principle has an additional and crucial role to play, since it is necessary that the treaty in question should have been applicable in respect of the conduct of the accused which is the subject of the charge. Whether this requirement, contained in subparagraph (b), is satisfied in any case will be a matter for the Court to decide. In principle non-compliance with the littera verba of a treaty will not be sufficient to constitute a crime if the treaty did not apply to the accused, whether in accordance with its terms or - perhaps more importantly - because the treaty did not apply as law to the conduct of the accused. For example, an act by a national of State A on the territory of State A may not be regarded as governed by a treaty if State A was not at the time of the conduct a party to the treaty and it was not part of its law. On the other hand the nullum crimen principle does not presuppose an exclusively territorial system of the application of treaty provisions. If the treaty was properly applicable to the conduct of the accused in accordance with its terms and having regard to the link between the accused and the State or States whose acceptance of the jurisdiction is required for the purposes of article 21, the accused should not be able to deny the applicability of the treaty merely because some third State was not at the time a party to the treaty or because it was not part of the law of that third State. For example, if a person commits a crime on the territory of State X, a party on whose territory the treaty is in force, the fact that the State of the accused's nationality is not a party to the treaty would be irrelevant.

(4) Having regard to subparagraph (a), there may be circumstances in which an individual could be convicted for a crime under international law in an international court although the same person could not be tried in a national court - although these cases will be rare. The position is different in the case of treaty crimes under subparagraph (b), since the mere existence of a treaty definition of a crime may be insufficient to make the treaty applicable to the conduct of individuals. No doubt such cases (which are also likely to be rare, and may be hypothetical) might raise issues of the failure of a State to comply with its treaty obligations, but that is not a matter which should prejudice the rights of an individual accused.

Article 40: Presumption of innocence

Commentary

Article 40 recognizes that in a criminal proceeding the accused is entitled to a presumption of innocence and that the burden of proof rests with the prosecution. The presumption of innocence is recognized in article 14 (2) of the ICCPR ("Everyone charged with a criminal offence shall have the right to be presumed innocent until proven guilty according to law"). Since the Statute is the basic law which governs trials before the Court, it is the Statute which gives content to the words "according to law". In the Working Group's view, the Prosecutor should have the burden of proving every element of the crime beyond reasonable doubt, and article 40 so provides.

Article 41: Rights of the accused

Commentary

(1) Paragraph 1 of article 41 states the minimum guarantees to which an accused is entitled in relation to the trial. It reflects as closely as possible the fundamental rights of the accused set forth in article 14 of the ICCPR, which reads as follows:

"Article 14

1. All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. The press and the public may be excluded from all or part of a trial for reasons of morals, public order (ordre public) or national security in a democratic society, or when the interest of the private lives of the parties so requires, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice; but any judgement rendered in a criminal case or in a suit at law shall be made public except where the interest of juvenile persons otherwise requires or the proceedings concern matrimonial disputes of the guardianship of children.

2. Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law.

3. In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality:

(a) To be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him;

(b) To have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing;

(c) To be tried without undue delay;

(d) To be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it;

(e) To examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;

(f) To have the free assistance of an interpreter if he cannot understand or speak the language used in court;

(g) Not to be compelled to testify against himself or to confess guilt.

4. In the case of juvenile persons, the procedure shall be such as will take account of their age and the desirability of promoting their rehabilitation.

5. Everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law.

6. When a person has by a final decision been convicted of a criminal offence and when subsequently his conviction has been reversed or he has been pardoned on the ground that a new or newly discovered fact shows conclusively that there has been a miscarriage of justice, the person who has suffered punishment as a result of such conviction shall be compensated according to law, unless it is proved that the non-disclosure of the unknown fact in time is wholly or partly attributable to him.

7. No one shall be liable to be tried or punished again for an offence for which he has already been finally convicted or acquitted in accordance with the law and penal procedure of each country."

(2) In connection with paragraph 1 (d), the question of the possibility of holding trials <u>in absentia</u> gave rise to conflicting views in the Working Group in its 1993 debates. The position is now dealt with by article 37, but the right of an accused to be present at the trial has been retained as one of the guarantees of a fair trial since it is included in article 14 (3) (d) of the ICCPR. See also article 37 (2) and commentary thereto.

(3) Paragraph 2 lays down a general duty of disclosure on the Prosecutor in relation to exculpatory evidence that becomes available at any time prior to the

conclusion of the trial, whether or not the Procuracy chooses to adduce that evidence itself. In case of doubt (e.g. as to whether the information would be admissible as evidence), the Prosecutor should seek direction from the Trial Chamber. On the other hand there is no obligation to disclose incriminating evidence if it is not going to be used by the Prosecutor during the trial.

Article 42: Non bis in idem

Commentary

(1) The phrase non bis in idem means that no person shall be tried for the same crime twice. It is an important principle of criminal law, recognized as such in article 14 (7) of the ICCPR.

(2) Article 14 (7) has been interpreted as limited to trials within a single jurisdiction. The Commission believes that a greater degree of protection against double jeopardy is required under the Statute and article 42 gives effect to this view, drawing heavily on article 10 of the Statute of the International Tribunal for the Former Yugoslavia, with minor modifications to take account of the possibility of a previous trial in another international court or tribunal.

(3) The non bis in idem principle applies both to cases where an accused person has been first tried by the International Criminal Court, and a subsequent trial is proposed before another court, and to the converse situation of a person already tried before some other court and subsequently accused of a crime under the Statute. In both situations, the principle only applies where the first court actually exercised jurisdiction and made a determination on the merits with respect to the particular acts constituting the crime, and where there was a sufficient measure of identity between the crimes which were the subject of the successive trials. As to the requirement of identity, article 42 uses the phrase "crime of the kind referred to in article 20". The non bis in idem prohibition does not extend to crimes of a different kind, notwithstanding that they may have arisen out of the same fact situation. For example, an accused might be charged with genocide but acquitted on the ground that the particular killing which was the subject of the charge was an isolated criminal act and was not carried out with intent to destroy a national, ethnical, racial or religious group as such, as required by article II of the Genocide Convention. Such an acquittal would not preclude the subsequent trial of the accused before a national court for murder.

(4) Where the first trial was held under this Statute and the Court reached a decision either convicting or acquitting the accused of the crime, that decision should be final, and the accused should not be subsequently tried by another court for that crime.

(5) Article 42 (2) deals with subsequent trial before the International Criminal Court in relation to a crime which has already been the subject of trial before another court. It does not in all cases bar the second trial. Instead, two exceptions are envisaged: (a) where the first trial was for an "ordinary crime"; and (b) where the first trial was a sham, i.e. was intended to protect the accused from international criminal responsibility.

(6) As to the first exception, the phrase "characterized as an ordinary crime" in paragraph 2 (a) requires explanation. Many legal systems do not distinguish between "ordinary" and other crimes, and in many cases "ordinary crimes" include very serious crimes subject to the most serious penalties. The Working Group understands that the term "ordinary crime" refers to the situation where the act has been treated as a common crime as distinct from an international crime having the special characteristics of the crimes referred to in article 20 of the Statute. For example, the same act may qualify as the crime of aggravated assault under national law and torture or inhuman treatment under article 147 of the Fourth Geneva Convention of 1949. The prohibition in article 42 should not apply where the crime dealt with by the earlier court lacked in its definition or application those elements of international concern, as reflected in the elements of general international law or applicable treaties, which are the basis for the International Criminal Court having jurisdiction under article 20.

(7) As to the second exception, paragraph 2 (b) reflects the view that the Court should be able to try an accused if the previous criminal proceeding for the same acts was really a "sham" proceeding, possibly even designed to shield the person from being tried by the Court. The Commission adopted the words "the case was not diligently prosecuted" on the understanding that they are not intended to apply to mere lapses or errors on the part of the earlier prosecution, but to a lack of diligence of such a degree as to be calculated to shield the accused from real responsibility for the acts in question. Paragraph 2 (b) is designed to deal with exceptional cases only.

(8) In the event that the Court convicts a person under either of the situations contemplated in paragraph 2, it must take into consideration in the determination of the appropriate penalty the extent to which the person has actually served a sentence imposed by another court for the same acts: see paragraph 3.

(9) One member of the Working Group would have preferred not to deal at all with subsequent trial in national courts, on the basis that the Court's jurisdiction is of an exceptional character, and that the general principles of the relevant national law can be relied on to avoid injustices arising from more than one trial of a person arising out of particular conduct.

Article 43: Protection of the accused, victims and witnesses

Commentary

(1) The Court should throughout take the necessary steps to protect the accused, as well as victims and witnesses. The non-exhaustive list of such measures provided in this article include ordering that the trial should be conducted in closed proceedings or allowing the presentation of evidence by electronic means such as video cameras.

(2) While the Court is required to have due regard for the protection of victims and witnesses, this must not interfere with full respect for the right of the accused to a fair trial. Thus while the Court may order the non-disclosure to the media or the general public of the identity of a victim or witness, the right of an accused to question the prosecution witnesses must be respected: see article 41 (1) (e). On the other hand, such procedures as giving testimony by video camera may be the only way to allow a particularly vulnerable victim or witness (e.g. a child who has witnessed some atrocity) to speak.

(3) The security of the record of proceedings is vital, and should be a matter for regulation under the Rules.

Article 44: Evidence

Commentary

(1) While some members felt that the issue of the rules of evidence should not be covered in the Statute itself (cf. art. 19 (1) (b)), others felt that basic provisions should be included. Article 44 is a via media, dealing only with certain more important aspects on the basis that most issues can be appropriately

dealt with in the Rules: cf. International Tribunal for the Former Yugoslavia, Rules 89-106.

(2) To help ensure that testimony given is reliable, witnesses should undertake to tell the truth, in a form prescribed by the Rules. In the legal systems of some States the accused is not required to take an oath before testifying; it will be a matter for the Rules to take account of such situations. The Statute does not include a provision making it a crime to give false testimony before the Court. On balance the Working Group thought that prosecutions for perjury should be brought before the appropriate national court, and paragraph 2 so provides.

(3) The prosecution or defence may be required to inform the Court of the nature and purpose of evidence to be offered in the trial to enable it to rule on its relevance or admissibility: see paragraph 3, which is similar to article 20 of the Nürnberg Charter. This should assist the court to ensure an expeditious trial limited in scope to a determination of the charges against the accused and issues properly related thereto. Some members also stressed the desirability of this provision to prevent the collection or production of evidence from being used as a delaying tactic during the trial, as well as the substantial costs which may be involved in translating inadmissible or immaterial evidence. Other members felt strongly that this provision should not be interpreted as allowing the Court to exclude evidence in ex parte or closed proceedings.

(4) Under paragraph 4, the Court may take judicial notice of facts which are common knowledge rather than requiring proof of them (cf. art. 21 of the Nürnberg Charter).

(5) The Court should exclude any evidence obtained by illegal means which constitute a serious breach of the Statute or of international law (including, but not limited to, internationally protected human rights). One member suggested that only evidence obtained in violation of a peremptory norm of human rights law should be inadmissible. However, others felt that the Court should exclude any evidence obtained in violation of international law, provided that the violation was serious, and paragraph 5 so provides.

Article 45: Quorum and judgment

Commentary

(1) Article 45 lays down the general rules concerning the necessary quorum during the trial and the extent of agreement required for taking decisions.

(2) Paragraph 1 requires four judges to be present at all times. This would not include alternate judges under article 9 (6) who had not yet been called on to act. Decisions as to conviction or acquittal and as to the sentence to be imposed require three affirmative votes, although the Chamber should make every effort to reach a unanimous decision.

(3) Provision is made in paragraph 3 for cases of failure to agree. The power of a Trial Chamber to order a retrial in such cases is strictly circumscribed. Such a power does not exist in some national systems; the trial court is required to reach a judgment, and if it cannot do so should acquit the accused. A retrial under the Statute is only possible where the Chamber has been reduced to four members only (e.g. by death or disability of one member) and they are deadlocked. Every effort should be made (e.g. through the use of alternate judges under article 9 (6)) to avoid this happening, and some members thought that in these cases the benefit of the doubt should always favour the accused.

(4) The deliberations of the Court are to be held in private and must remain secret: see paragraph 4.

(5) The Court is to publish a single judgment reflecting the opinion of the majority of judges, and with no dissenting or separate opinions: see paragraph 5. Different views were expressed on the desirability of allowing separate or dissenting opinions. Some felt that they could undermine the authority of the Court and its judgments. Other members believed that judges should have the right to issue separate, and especially dissenting, opinions as a matter of conscience, if they chose to do so, pointing out that this was expressly allowed by article 23 (2) of the Statute of the International Tribunal for the Former Yugoslavia. It was also suggested that these opinions would be important in the event of an appeal. On balance the Working Group preferred the former view.

(6) As noted in the commentary to article 42, an acquittal on a charge under the Statute does not preclude the possibility that the accused may be guilty of some crime under national law arising out of the same facts. It would no longer be

justified to detain an accused after a final judgment of acquittal under the Statute, but the Court should, subject to the rule of specialty under article 55, be able to make arrangements for the transfer of a person to the relevant State in such circumstances.

Article 46: Sentencing

Commentary

(1) Sentencing is generally considered to represent a separate process which is distinct from the trial. The purpose of the trial is to determine the truth of the charges against the accused; the purpose of the sentencing hearing is to determine an appropriate punishment in relation to the individual as well as the crime. Of course the fundamental procedural guarantees inherent in a fair trial, notably the right to counsel, also extend to the sentencing hearing. The Working Group felt that these considerations merited a further and separate sentencing hearing: this is provided for in paragraph 1, although details of the procedure are left to the Rules.

(2) At the conclusion of the sentencing hearing, the Court is required to consider the matter in private, and to decide on an appropriate sentence, having regard to such factors as the degree of punishment commensurate with the crime in accordance with the general principle of proportionality.

Article 47: Applicable penalties

Commentary

(1) Article 47 specifies the penalties available to the Court in determining the appropriate punishment in a particular case. They are a term of imprisonment up to and including life imprisonment and a fine of a specified amount. The Court is not authorized to impose the death penalty.

(2) In determining the term of imprisonment or the amount of fine to be imposed, the Court may consider the relevant provisions of the national law of the States which have a particular connection to the person or the crime committed, namely the State of which the convicted person is a national, the State where the crime was committed and the State which had custody of and jurisdiction over the accused.

(3) The 1993 draft Statute provided for the Court to order restitution or forfeiture of property used in conjunction with the crime. However, some members questioned the ability of the Court to determine the ownership of stolen property

in the absence of a claim filed by the original owner, which might need to be considered in a separate proceeding. Others felt that it was not appropriate to authorize the Court to order the return of stolen property, a remedy which they considered to be more appropriate in a civil rather than a criminal case. One member suggested that allowing the Court to consider such matters would be inconsistent with its primary function, namely to prosecute and punish without delay perpetrators of the crimes referred to in the Statute. On balance the Working Group considered that these issues were best left to national jurisdictions and to international judicial cooperation agreements, of which there is a growing network. The relevant provisions have accordingly been deleted.

(4) Some other members while regretting that decision, felt that as a consequence provisions such as those in article 47 (3) (b) and (c) should also be deleted, since these were in a sense aimed at reparation for victims. On the other hand, although a reflection of concern for victims of crimes, subparagraphs 3 (b) and (c) are not intended in any way to substitute for reparation or to prevent any action which victims may take to obtain reparation through other courts or on the international plane.

(5) Some members felt that, following the suggestions formulated by the Vancouver meeting of experts, sanctions other than detention should exceptionally be provided for. In particular, the Court should be empowered to order community service in aid of the victim or society at large.

---